IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 01.03.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.666 of 2000

Iadayam Investments
Rep by its Managaing Partner
S.N.Sankaranarayanan
1371-A-Trichy Road,
Coimbatore. .. Appellant/Complainant

vs.

M.Ramasamy .. Respondent/Accused

Prayer: This appeal has been preferred under section 378 Cr.P.C against Judgment dated 09.06.2000, in STC.No.1240 of 1997 on the file of the Court of Judicial Magistrate No.V, Coimbatore.

For Appellant : Mr.S.Subbiah

For Respondent : Mr.D.Bharatha Chakravarthi for M/s. Sai, Bharath & Ilan

JUDGMENT

This appeal has been preferred against Judgment in STC.No.1240 of 1997 on the file of the Court of Judicial Magistrate No.V, Coimbatore. The complainant has preferred a private complaint under Section 200 of Cr.P.C for offence under Section 138 of Negotiable Instrument Act.

2. In the private complaint the complainant would alleged that the accused had borrowed Rs.3,00,000/- from the complainant, a partnership firm which was represented by the complainant, the Managing Partner S.N.Sankaranarayanan. It is the definite case of the complainant that the accused had issued a cheque for Rs.4,35,000/- dated 17.3.1997 drawn on Bank of Baroda, Coimbatore. The said cheque was issued by the accused to discharge the said loan. When the cheque was presented before the Tamil Nadu Mercantile Bank, Big Bazar Branch, on 18.3.1997, the same was returned on 19.3.1997 with an endorsement "no sufficient funds". The accused had issued the cheque with a view to defraud the

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complainant. The accused failed to arrange funds to honour the cheque. The complainant issued a lawyer's notice dated 24.3.1997 informing the accused about the dishonouring of the cheque and called upon him to pay the amount within 15 days from the date of receipt of notice. The accused received the notice on 29.3.1997. But the accused has not chosen to send any reply nor repay the amount. Hence, the complaint.

3. The learned trial Judge has taken the complaint on file after recording the sworn statement as STC.No.1240/1997 and issued summon to the accused for appearance. On appearance of the accused, the learned trial Judge has furnished copies to the accused under Section 207 of Cr.P.C and when the offence was explained to him the accused pleaded not guilty. On the side of the complainant P.W.1 and P.W.2 were examined and Ex.P.1 to P.7 were marked.

4. P.W.1 is the complainant. He would depose that he is the partner of the complainant-company viz. Idayam Investments and that the accused-Ramasamy had borrowed Rs.3,00,000/- as a loan and issued a cheque dated 17.03.1997 for a sum of Rs.4,35,000/- and when the said cheque was presented in the Bank on 18.3.1997, the same was dishonoured on 19.3.1997 on the ground that there was no sufficient funds in the account of the accused. The complainant had issued notice on 24.3.1997 informing about return of the cheque. The said notice was received by the accused on 29.3.1997 but the accused neither sent any reply nor paid the debt amount. Ex.P.1 is the dishonoured cheque. Ex.P.2 is the bank's memo. Ex.P.3 is the copy of the notice issued by the complainant to the accused. Ex.P.4 is the acknowledgment for the notice being received by the accused. When P.W.1 was recalled and examined in chief further on 16.3.1999, he would depose that the said loan of Rs.3,00,000/- was advanced to the accused by way of a cheque of Tamil Nadu Mercantile Bank and Ex.P.6 is the counter-foil for the said cheque dated 15.12.1993. He would further depose that Ex.P.7 is the income tax returns submitted by the complainant for the assessment year 1998-1999.

5. P.W.2 is an employee of Bank of Baroda, Coimbatore Branch. According to P.W.2, Ex.P.1-cheque leaf belongs to the Bank of Baroda and that the said cheque along with the cheque book was given to the accused since he has opened an account with the said Bank and that Ex.P.1-cheque was drawn for a sum of Rs.4,35,000/- and the said cheque was presented in his Bank through Tamil Nadu Mercantile Bank on 19.3.1997 and that the said cheque was returned with an endorsement that there is no sufficient funds available in the accounts of the accused. Ex.P.5 is the statement of accounts relating to the account of the accused.

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6. After going through the evidence both oral and documentary produced before him, the learned trial Judge has come to the conclusion that the guilt against the accused under Section 138 of Negotiable Instruments Act was not proved beyond any reasonable doubt and consequently acquitted the accused under Section 255(1) of Cr.P.C. Aggrieved by the findings of the learned trial Judge, the complainant has preferred this appeal.

7. Now the point for determination in this appeal is whether there was any subsisting liability or debt as contemplated under Section 138 of Negotiable Instruments Act on the date of drawal of Ex.P.1-cheque to warrant conviction under the said provision of law?

8. The Point:-

8(a) The complainant was examined as P.W.1. According to P.W.1, the accused had borrowed Rs.3,00,000/- on 17.3.1997. To prove the fact of lending the loan, the complainant has produced two documents. One is Ex.P.6, a counter-foil of the cheque through which the said loan of Rs.3,00,000/- is said to have been disbursed to the accused and the other document is Ex.P.7-income tax return of the complainant-company for the assessment year 1998-1999. There is no seal found in Ex.P.7 of the income tax department.

8(b) The learned trial judge has acquitted the accused only on the ground that there was no subsisting debt on the date of drawal of Ex.P.1-cheque. Even in the cross-examination P.W.1 would admit that only including the interest for the principle amount Rs.3,00,000/- the amount due to the complainant on the date of issuance of cheque comes to Rs.4,35,000/-. The learned trial Judge has also observed that admittedly the loan is for Rs.3,00,000/- which was advanced by the complainant to the accused on 15.12.1993. But the cheque is dated 17.3.1997 ie., three years after the date of lending of loan to the accused and that under Section 25(3) of the Indian Contract Act that is not an acknowledgment for the said debt before the time of limitation prescribed under the Limitation Act and the trial Judge has come to the definite conclusion that it is a time barred debt.

8(c) P.W.1 in his deposition in the cross-examination on 29.5.2000 would admit that he has not produced any documentary evidence to show that the accused owes Rs.4,35,000/-. During his cross-examination on 6.1.1999 P.W.1 would depose that the accused has obtained mortgage loan and that the original deed is with him. But the complainant has not produced either the mortgage deed or any other deed to show that the mortgage was on deposit of title

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deeds. To attract the offence under Section 138 of Negotiable Instruments Act, it is the bounden duty of the complainant to prove beyond any reasonable doubt that the dishonoured cheque was drawn only to discharge a subsisting debt. But in this case the complainant has miserably failed to prove that there was a subsisting debt of Rs.4,35,000/- and only to discharge the said debt Ex.P.1-cheque was drawn by the accused.

8(d) Section 138 of the Negotiable Instruments Act runs as follows:-

> Dishonour of cheque for insufficiency, etc., of funds in the accounts -
>
> Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:
>
> PROVIDED that nothing contained in this section shall apply unless -
>
> (a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier.
>
> (b) The payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice, in writing, to the rawer of the cheque, within thirty days of the receipt of information by him from the bank regarding the return of the cheque as unpaid, and
>
> (c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.
>
> Explanation: For the purpose of this Section, "debt or other liability" means a leagally enforceable debt or other liability"

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8(e) The learned counsel for the appellant would contend that under Section 139 of Negotiable Instruments Act when the accused had drawn Ex.P.1-cheque for Rs.4,35,000/- the presumption should be that the consideration passed. But before taking such a presumption it is the bounden duty of the complainant under Section 138 of the Negotiable Instruments Act to show that there was a subsisting debt on the date of drawl of the cheque. Even as per the explanation to Section 138 of Negotiable Instruments Act, the debt or other liability means a legally enforceable debt or other liability. The loan of Rs.3,00,000/- was advanced to the accused on 15.12.1993 as admitted by P.W.1, Ex.P.1-cheque dated 17.3.1997 will not save limitation.

8(f) The learned counsel for the appellant relied on 2002(2) SCC 642 (A.V.Murthy Vs. B.S.Nagabasavanna) and contended that a private complaint under Section 138 of Negotiable Instruments Act cannot be dismissed on the ground that there was no consideration passed under the dishonoured cheque. A reading of the above cited judgment of the Honourable Apex Court will go to show that the District and Sessions Judge has quashed the proceedings which was pending on the file of the Magistrate concerned on the ground that there was no legally enforceable debt or liability. While setting aside the order of the learned Sessions Judge, which was upheld by the High Court, the Honourable Apex Court has observed that without giving an opportunity to the complainant to let in evidence the Court cannot give a finding to the effect that there was no subsisting or enforceable debt. But that is not the case herein. In the case on hand the parties have been given full opportunity before the trial Court to let in evidence and further after going through the evidence both oral and documentary the learned trial Judge has come to the conclusion that there was no subsisting or enforceable debt for which Ex.P.1 is said to have been drawn by the accused. Under such circumstances, I do not find any reason to interfere with the findings of the learned trial Judge in STC.No.1240/1997, on the file of the Judicial Magistrate No.V, Coimbatore, which is neither illegal nor infirm. Point is answered accordingly.

8. In fine, the appeal is dismissed confirming the judgment in STC.No.1240/1997, on the file of the Judicial Magistrate No.V, Coimbatore.

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To,

1. The Judicial Magistrate No.V,
Coimbatore.

2. Do Thro The Chief Judicial Magistrate,
Coimbatore.

+ 1 cc to Mr. S. Subbiah, Advocate, SR No.13202

+ 1 cc to Mr. Sai, Bharath & Ilan, Advocate, SR No.12447

KV(CO)
SR/12.3.2007

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